Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of Public Knowledge, et al.	)	
	)	
For a Declaratory Ruling Stating That Text Messaging and Short Codes Are Title II Services or Are Title I Services Subject to Section 202 Nondiscrimination Rules	))))	WT Dkt. No. 08-7

COMMENTS OF VERIZON WIRELESS

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Date: March 14, 2008

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Verizon Wireless submits these initial comments opposing the Petition for Declaratory Ruling filed by Public Knowledge and seven other groups.[1] The Petition requests the Commission to declare that text messages and short codes are Title II services, or are Title I services subject to Section 202 of the Communications Act.

SUMMARY

The Commission should deny the Petition. As a *policy* matter, there are no grounds to regulate either text messages or short codes. Customers send billions of text messages a month and have access to thousands of short codes, and the Petition fails to show any problem warranting regulation. Intruding into this well-functioning part of the wireless market as the Petition demands would not only be unwarranted but would harm wireless consumers. As a *legal* matter, neither text messaging nor the provision and use of short codes are telecommunications services and thus they are not subject to Title II. Nor is there any lawful

[1] Petition for Declaratory Ruling of Public Knowledge, Free Press, Consumer Federation of America, Consumers Union, Educause, Media Access Project, New America Foundation, and U.S. PIRG ("Petition"), filed December 11, 2007. The Commission sought comments on the Petition, and extended the comment date to March 14, 2008. *See* Public Notice, DA 08-78, released Jan. 14, 2008; Order, DA 08-282, released Feb. 1, 2008.

basis to impose regulations on text messaging or short codes under Title I. Imposing the regime the Petition requests would also violate the First Amendment, by regulating wireless operators' constitutional right to determine what advertising and other content from non-subscribers can appear on their networks.

1. The Petition provides no grounds to regulate text messaging, and wireless operators do not block text messaging except to stop spam. The Petition focuses on why the Commission should regulate wireless text messaging as a common carrier service, but it fails to present any facts that could justify regulation of text messaging. As Section I of these Comments explains, Verizon Wireless does not block customers who subscribe to text messaging services from sending messages. Nor does it block customers from receiving text messaging, other than by filtering unsolicited mass text messages sent by spammers, a practice that Petitioners do not criticize. There is thus no reason for the Commission to consider the Petition with respect to text messaging at all.

2. Short codes are proliferating and are widely available to wireless subscribers. The Petition confuses text messaging with the provision of "common" short codes, which is a network capability that wireless operators implement to enable advertisers or other third parties to reach customers of multiple wireless operators through the use of an abbreviated dialing code. But, again, the Petition fails to prove a problem. Section II documents the rapid growth of common short codes as another market-driven product offered by the highly competitive wireless industry. Out of the more than 3,200 short codes that Verizon Wireless has implemented, the Petition cites only two that Verizon Wireless declined, and in one of those cases the company quickly reversed that decision and implemented the short code. There is no problem in the provisioning of common short codes that warrants Commission attention, let alone regulation.

3. The wireless and mobile content industries have put in place numerous safeguards to protect subscribers from offensive or deceptive short code campaigns. Section III of these Comments explains how Verizon Wireless screens requests for short codes from advertisers to ensure they meet its standards for content on its network. These content guidelines are consistent with the guidelines that other operators and mobile content providers developed for all wireless content, in part at the urging of the Commission, as well as groups concerned about adult content and the need to protect children from inappropriate material. The guidelines do not approve short code campaigns that, for example, promote the use of alcohol, tobacco, drugs, or gambling, or contain excessively violent or sexual material. The company also screens short code requests to ensure, for example, that they comply with laws governing sweepstakes, that customers will knowingly "opt in" to the advertisers' services, and that customers are aware of any premium charges for messages they will incur. These policies are fully in line with Verizon Wireless' right to determine whether third parties can present advertising and other content on its network. In this respect, wireless operators are no different from any other "publisher" of content—a book or magazine publisher, a broadcast station or a newspaper—that determines what content it will accept.

4. Granting the Petition would undermine these valid consumer protection policies. Prohibiting wireless operators from restricting the provisioning of short codes, as the Petition requests, would prevent them from reviewing proposals in ways that protect customers by, for example, stopping unlawful or offensive content or preventing deceptive campaigns. Section IV documents how third parties would have unrestrained access—and wireless operators would be prohibited from preventing ads promoting drugs, pornographic content, harassing messaging campaigns, or unsolicited messages, from barraging their customers. Also, once under a common carrier regime for test messaging and provisioning short codes, wireless operators would also be unable to take the same steps to safeguard against wireless spam that they take today. The Commission has urged wireless operators to protect customers from unwanted text messages. Unwanted text messages can originate through short code campaigns as well as from the Internet. Consideration of the Petition would be flatly at odds with the Commission's past actions. There is absolutely no public policy reason to open the floodgates for spam—and every reason not to do so.

5. Text messaging and short codes are not telecommunications services and cannot be regulated under Title II. Section V explains why text messaging is an *information* service under longstanding precedent, and is not subject to Title II regulation. The Commission thus cannot impose Section 202 obligations on wireless operators' text messaging services or on the provisioning of short codes. Moreover, even were text messaging a Title II service, the distinct provisioning of short codes to mobile content providers is not. A wireless operator's arrangements with a mobile content provider to deploy a short code is not a "service" subject to the Communications Act, and no "telecommunications" is involved. Short codes thus cannot be regulated under *either* Title I or II. Petitioners' assertion that short codes are subject to the Broadband Policy Statement is incorrect because that statement does not apply to wireless services and short codes are not related to broadband Internet access, nor are they, as Petitioners concede, Internet-based.

6. Petitioners' request that the Commission make an end run around Title II by imposing Section 202 obligations under Title I is unlawful. As Section VI explains, Supreme Court precedent and the Act's explicit provisions do not grant the Commission "ancillary" authority under Title I to impose the non-discrimination provisions of Title II. Those provisions apply only to common carrier services. Neither text messaging nor common short codes are common carrier services. Nor do Petitioners offer any facts that could support the exercise of any ancillary authority the Commission may possess.

*7. **Imposing anti-discrimination obligations on wireless operators' use of short codes would violate the First Amendment.*** Petitioners argue that Section 202 obligations are needed to protect "new modes of speech,"[2] but they have the First Amendment issue precisely backward: the non-discrimination duty they propose would undercut the free speech rights of *wireless operators*. As discussed in Section VII, by managing short code campaigns, wireless operators exercise editorial discretion by choosing to feature certain content, but not all content. Under settled principles, these activities constitute expression protected by the First Amendment. Imposing a common carrier non-discrimination obligation would violate operators' constitutional rights. In deciding which common short code campaigns to authorize, wireless providers exercise their right to make editorial judgments about the content delivered over their networks. That right is protected by the Constitution, and does not yield merely because content providers would like access to their networks. And, wireless providers engage in their own speech over their text messaging services and offer their own short codes, which would be burdened by imposing a common carrier regime. Petitioners fail to justify their proposed regime that would compel wireless operators to offer short codes. Finally, they make no factual case that wireless markets suffer from a problem justifying regulation, that the regulation they want would be narrowly tailored, or that it would achieve an important government interest. On these grounds as well, the Petition must be denied.

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[2] Pet. at 19.

I. TEXT MESSAGING SHOULD NOT BE AT ISSUE IN THIS PROCEEDING BECAUSE THERE ARE NO ALLEGATIONS OF WIRELESS OPERATORS BLOCKING CUSTOMERS' MESSAGES; THE FOCUS IS ON PROVISIONING "COMMON SHORT CODES."

The Petition commingles and confuses assertions about text messaging with other assertions about short codes. At one point, it asks for a ruling that "text messaging services, including those sent to and from short-codes, are governed by the anti-discrimination provisions of Title II of the Communications Act."[3] At another, it wants the Commission to decide that "refusing to provision a short code or otherwise blocking text messages because of the type of speech ... violates the law."[4] But the Petition's Conclusion asks the Commission to declare that "mobile carriers are prohibited from engaging in unjust and unreasonable discrimination in providing text messaging services," without any reference to short codes.[5]

It is extremely important that the Commission distinguish between these two very different wireless products.

Text messaging, also known as "short message service" or "SMS," is a service that wireless operators offer to their customers to send and receive short data messages. Verizon Wireless' SMS product enables its subscribers to send and receive text messages through mobile handsets. This service permits customers to exchange messages not only with other Verizon Wireless-affiliated handsets, but also with handsets associated with other wireless service providers, with electronic mail ("email") accounts, and with landline phones (through a separate voice relay service). There are two types of messages: mobile originated ("MO") and mobile terminated ("MT"). Messages are routed through a short messaging service center ("SMSC")

[3] *Id.* at ii.
[4] *Id.* at 2.
[5] *Id.* at 25.

server, where they are "stored" until automatically forwarded or "retrieved" by the destination handset shortly thereafter, or when the handset becomes active in the service area covered.

Wireless customers send literally billions of text messages every month. Verizon Wireless, for example, handled more than 45 billion text messages in the fourth quarter of 2007. The Commission has documented the explosive growth of text messaging each year in its CMRS Competition Reports.[6] Over the past six years U.S. wireless companies have developed ways to ensure that text messages can be sent from and delivered to any mobile service subscriber.[7]

The Petition alleges no facts suggesting that Verizon Wireless or any other wireless operator improperly blocks text messages to and from their subscribers or discriminates among the text messages their subscribers send. In fact, Verizon Wireless does not block or impede text messages sent *by* its subscribers.[8] Nor does it block text messages addressed *to* its subscribers, except for those text messages that are captured by its spam filters, or those messages for which the subscriber has imposed an affirmative text message block. To protect subscribers, Verizon Wireless blocks and discards millions of text messages each year that are identified by its spam filters as unsolicited mass messages sent from specific sites or numbers to our subscribers. Because a subscriber may be billed for each text message sent or received, or each text message received may impact a subscription to a text bundle, and because attempts to deliver such mass messages may interfere with the delivery of wanted text messages to subscribers, it is both

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[6] *See, e.g.*, *Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services, Twelfth Report ("Twelfth CMRS Report")*, 2008 WL 312884, ¶ 2 (Feb. 4, 2008) (noting 18.7 billion text messages sent in December 2006, up from 9.8 billion sent in December 2005).

[7] *See, e.g.*, "GSM and CDMA MMS Interoperability Report Announced," Mobile Tech News (May 7, 2004), http://mobiletechnews.com/info/2004/05/07/105706.html.

[8] A text message sent to a telephone number may not be delivered for several reasons, including, for example: the device addressed may not be SMS capable; the device addressed may not become active within the storage life of the text message; or, there may be no intercarrier agreement for delivery of SMS effective between the sending subscriber's carrier and the addressed subscriber's carrier.

beneficial and necessary to block text messages identified as spam from reaching subscribers' mobile devices.[9]

There is thus no reason for the Commission to consider the Petition with respect to text messaging at all. To the extent the Petition does seek a declaration that Section 202 of the Act applies to text messaging, Section V of these Comments demonstrates why that would be unlawful, given that text messaging, just like email, is clearly an information service and is thus not subject to Section 202, and given that the Act does not permit Section 202 regulation of information services.

Short codes, in contrast, are the real focus of the Petition. Even then, however, it does not address short codes per se, which are simply abbreviated codes that substitute for ten-digit numbers. Wireless operators and customers use such abbreviated numbers for a multitude of purposes. For example, a business customer can set up a four-digit code for its employees to reach a home office. These numbers generally do not operate across different wireless operators because they are particular to the wireless companies' own networks.

What Petitioners really address are what are known as ***"common short codes,"*** or "CSCs." These are 5- and 6-digit codes that have been set aside by the industry for common use so that they would work across all participating wireless companies' networks. They enable advertisers or other third parties to reach customers by promoting a single code in what is known as a "campaign." The code is loaded into the networks of participating wireless operators through translations changes. These advertisers or other third parties are not subscribers to

[9] Spam is a huge and growing issue for both wireline and wireless networks. Many states' Attorneys General have begun investigations into spammers, and Verizon Wireless has devoted considerable effort to stopping spam. While Petitioners do not appear to challenge carriers' anti-spam practices, the result of the ruling they request would seriously undermine carriers' efforts to stop spam. If, as Petitioners ask, text messaging is deemed a Title II service, carriers would have limited ability to block any such text messaging, regardless of its source or whether a customer has agreed to receive the message. As Section IV of these comments explains in more detail, this alone should be reason to deny the Petition.

Verizon Wireless, and Verizon Wireless is not selling them a service, much less a service that involves any communications. Just as these content providers can lease a billboard, or buy a spot on a radio station, or buy a display ad in a newspaper, they can lease a short code as a way to conduct a campaign advertising their products or services. And just as a billboard owner, radio station or newspaper can decline to sell ad space, so too can a wireless operator decline to make the changes to its network to implement a short code. But establishing a relationship with the third parties through a short code is entirely distinct from the communications services that wireless operators offer their customers. Just as an 800-number is not the same as a telephone call, a common short code is not the same as text messaging.[10]

Thus the real focus of the Petition is to attack wireless operators' policies for accepting CSC campaigns and implementing them on their networks. It asserts that the Communications Act requires wireless operators to load any and all CSCs into their networks upon request, without discrimination. The following sections of these Comments address this claim.

- **Section II** reviews the growth of short codes in response to consumer interest and explains the CSC process in detail.
- **Section III** reviews the many policies the mobile content industry and wireless companies have adopted to oversee the deployment of short codes—policies that protect consumers.
- **Section IV** shows why the relief sought—effectively overriding wireless operators' valid policies for overseeing the use of short codes—is not only unwarranted but, worse, would affirmatively harm subscribers.
- **Section V** explains why, as a legal matter, the Communications Act does not authorize the Commission to impose Section 202 requirements on wireless operators' provisioning of text messaging or short codes.
- **Section VI** shows why the Commission does not have ancillary authority under Title I to impose Section 202 requirements on text messaging or short codes.

[10] *See* Mark Lowenstein, "The Evolution of Text Messaging and the Role of Operators," at 4-5 (March 2008) (describing the differences between text messaging and use of common short codes) (Attachment H).

- **Section VII** demonstrates that imposing such a mandate would violate wireless operators' First Amendment rights as an unconstitutional government regulation of speech.

II. THE COMPETITIVE WIRELESS MARKET IS DRIVING THE GROWTH OF COMMON SHORT CODE CAMPAIGNS.

A. Common Short Code Campaigns Are Proliferating And Are Widely Available to Wireless Subscribers.

The Petition incorrectly suggests that wireless operators are unlawfully blocking access to information via short codes, and that the problem is significant enough to warrant Commission intervention. But, as noted above, regardless of whether they agree to activate a short code, wireless operators do not block customers from sending and receiving text messages, or other communications to subscribers. The Petition's real complaint is that wireless operators are preventing advertisers or other third parties from accessing their network through a short code arrangement. Why this issue merits Section 202 regulation is not clear, since that section does not regulate in any way the relationship between a wireless operator and an advertiser.

In any event, the Petition ignores the fact that wireless companies have implemented literally thousands of CSC campaigns that are proliferating in response to consumer interest—all without any government intrusion or regulation. The hyper-competitive wireless industry is driving operators to offer CSC campaigns, as well as an ever-expanding variety of messaging and other data services. The use of CSC campaigns has expanded in a number of different formats, including, for example:

- Voting, polls, surveys
- Delivery of mobile merchandise, information
- Contests, sweepstakes
- Commercial ads, noncommercial messaging campaigns
- Dating services, chatrooms
- Interactive games

Through CSC campaigns enabled on Verizon Wireless' network, consumers have been able to access political outreach and advocacy campaigns, including Rock the Vote, a nonpartisan get out the vote campaign aimed at young adults, 788683; a tax repeal advocacy campaign, 66829; the Kucinich campaign, 73223; the Clinton campaign, 77007; the Obama campaign, 62262; and the Romney campaign, 648808. Verizon Wireless has accepted campaigns that enable subscribers to download ringtones and wallpapers (e.g., Flycell, 69999; Playphone, 77888; Ringtone.com, 36726; DadaMobile, 63232), participate in news and weather alerts and polling (e.g., ESPN, 79710; CBS 66247; The Weather Channel, 42278), use search functions to find local businesses and people (e.g., Microsoft's 95483) or sports scores, stock quotes, and movie times (e.g., 4INFO, 44636), or real estate listings (e.g., Bouncepad, 268623). They have been able to sign up for advice on dating (Rockwood Telecom's DatingTipsonDemand.com, 52225), coupons and advertising (e.g., Coupons, Inc., 60606), social networking services (e.g., Mobile Chat, 44665), or auctions (e.g., New Motion's Bid4Prizes.com Reverse Auction, 81000).

Verizon Wireless began accepting short codes for these and other CSC campaigns in 2004. Since then, it has accepted over 3,200 different short code campaigns, and is seeing new requests at a current pace of several hundred each month. The plethora of different strategies used by third parties in their short code campaigns belies the Petition's claim that there is a problem with provisioning short codes or that regulation is appropriate. To the contrary, the proliferation of short codes is but one aspect of the rapid growth and expansion of wireless service, driven by competition.[11]

[11] *See id.* at 10-11 (the use of CSC campaigns is evolving rapidly, and will likely expand to new brands and applications).

B. The Common Short Code Administration Process

There are four participants in the short code campaign environment.

1. CTIA is the **CSC Administrator**, and Neustar serves as the Registry. (See Attachment A.) They track which short codes are in use and which remain available. An organization that wants to lease a CSC must do so through the CSCA. Both vanity codes and random codes are available for lease.

2. The **third-party content provider** leases a short code from the CSCA and develops a campaign with advertisements, texts/pictures, or other content, and then contracts with a messaging aggregator to send text messages to and from the wireless operator's network. The third-party content provider also uses messaging aggregators to cause charges from some CSC campaigns to be applied to the bills of wireless subscribers through the wireless operator's billing system.

3. The **messaging aggregator** serves as the connection between a wireless operator and the content provider. The messaging aggregator contracts with the wireless operator to keep track of subscribers who register for content and to obtain access to the operator's billing system. The aggregator may also arrange with the content provider to keep a registry of consumers who have requested content and to submit charges for the content to the operator's billing system.

4. The **wireless operator** must enable CSCs on its network in order to make them active and to establish a billing system function for the charges that are incurred by subscribers. This is done by making network "translations," generally at Short Message Service Centers ("SMSCs"), so that the SMSCs will recognize the CSC and know where to route messages using it. Once an advertiser or other third party has acquired a short code, it must request that the code be enabled for service on each wireless network with subscribers that the organization wishes to reach. Usually, the process of submitting a campaign is conducted through the messaging aggregator,

which also serves as the portal for receipt of messages from subscribers and the delivery of messages from the organization. When the code is enabled on the network, subscribers may send a text message to the code and sign up for receipt of content, and the organization may then send messages through the aggregator to those persons that have identified themselves as desiring to receive the content.

A short code campaign typically imposes standard text messaging charges on a subscriber, and also may entail premium charges in the form of a subscription or one-time charge to receive specific content. Generally, the process by which a wireless subscriber registers for a premium charge content campaign is as follows:

- A would-be subscriber sends a text message to the short code reserved for a premium charge content service, or signs up on a website in order to register for receipt of the premium content.
- The messaging aggregator's server, known as a messaging hub, receives the short message from the subscriber, and sends the subscriber a text message that includes the amount of the premium charge.
- In order to proceed, the subscriber must then respond with a text message accepting the premium charge. The subscriber must confirm approval of the charge in order to complete the registration process.
- After the messaging hub receives confirmation of approval of the charge, the hub sends a message to the subscriber with thanks for participation.
- After the hub receives a delivery confirmation of the "thanks" message, it creates a premium billing usage record and submits it to Verizon Wireless for processing.
- If the campaign sends periodic information, the holder of the short code delivers content to the aggregator, and the aggregator sends a text message with the content attached to the registered participants.

At Verizon Wireless, all billed charges for premium content appear on the subscriber's bill as a charge with the name of the content provider identified. If the subscriber disputes the charge, he or she calls Verizon Wireless customer service, which will either verify the charge or remove it. Customer service representatives will also help subscribers unsubscribe to a content service, or block all text messages, or block all premium charge text message campaigns upon request.

The Petition asserts that wireless operators are refusing to implement short codes but it cites only two examples—one of which involved denial of a short code that was reversed in less than 24 hours from the time that the management of the wireless operator learned about the denial. This is hardly evidence of "blocking" that warrants attention, let alone regulation. And, as described below, the limited controls that the mobile content industry and wireless operators have put in place are fully reasonable and justified. There is, in short, no basis for the Commission to take up the Petition at all.

Moreover, Petitioners fail to demonstrate that the isolated instances they cite have an anticompetitive impact. They vaguely suggest that wireless operators may use their management of text messaging to "stifle innovative competitors,"[12] but offer no facts or any explanation how any wireless operator has the market power to do so. In fact, the Commission has repeatedly concluded, as late as last month, that the wireless services market remains intensely competitive. "No single competitor," the Commission found, "has a dominant share of the market."[13] If consumers want to join a short code campaign that Verizon Wireless has not enabled, they may switch to a provider willing to enable that campaign. Consumers' ability to vote with their feet in a competitive market belies the notion that any single wireless operator can "stifle" competitors.[14]

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[12] Pet. at ii.

[13] *Twelfth CMRS Report*, at ¶ 2.

[14] *See* Christopher Yoo, *Network Neutrality and the Economics of Congestion,* 94 Georgetown L.J. 1847, 1892 (2006) ("a close examination of the leading models of network economic effects reveals that anticompetitive outcomes necessarily depend on the existence of a dominant network owner with market power").

III. WIRELESS OPERATORS HAVE PUT IN PLACE NUMEROUS SAFEGUARDS TO PROTECT SUBSCRIBERS.

Short code campaigns have proven to be popular among both content providers and subscribers. But like other forms of marketing, they can create a number of complex issues that require wireless operators to review a campaign carefully before activating a short code.

- Short code-based text messaging campaigns can alienate customers by providing them with content they do not want or even find objectionable. In part because of branding and customer relation issues, many wireless operators have chosen not to offer adult-oriented content over their networks. Customers may find the content offensive because it is adult-oriented or excessively violent, not want other family members on their account to have access to the content, or complain that the nature of the advertising was not accurately described by the content provider.

- Content can raise legal concerns. Has the short code promoter secured needed copyright protection? Does the sweepstakes or other contest being promoted comply with federal and state gaming laws?

- Short code campaigns present customer disclosure and consent issues because subscribers often incur a standard text message charge for text messages and, for many campaigns, they also incur a premium one-time or subscription charge.[15] They may object to charges for receiving messages or wish to stop receiving further messages at all. Wireless operators thus want to ensure that there is an appropriate opt-in or other process for customers to consent to receive and pay for messages. Wireless operators generally assume responsibility for responding to complaints about premium charges for content. Therefore, when subscribers call to complain about unexpected charges, it is the responsibility of the wireless operator to resolve the customer's concern.

- The use of short message code campaigns for mass messaging from the public (e.g., voting within a set time period on contestants in a television program) can result in a slowdown or impairment in the delivery of other services by the wireless network.

A. Voluntary Industry Practices Protect Consumers.

In an effort to avoid such problems and to protect consumers from unwanted text messages, the mobile content industry and the mobile service industry have developed voluntary industry guidelines for use with short code message campaigns.

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[15] *See, e.g.,* Lowenstein, *supra* note 10, at 6 (discussing problems with unwanted charges).

1. The Mobile Marketing Association ("MMA") has published a "Common Short Code Primer" (Attachment B) that explains to content providers how to establish a campaign using a short code and what practices are generally acceptable in the industry.

2. The MMA also publishes "Consumer Best Practices Guidelines" (Attachment C) that provides information on creating an effective short code messaging campaign. For example, the Best Practices Guidelines has details on various forms of "opt-in" procedures for subscriber acceptance of charges. In the mobile marketing industry, campaigns generally use a single opt-in for consumers if the only charge is a standard text message charge and a double opt-in for campaigns that impose premium charges. These best practices also include information on how to provide subscribers with a method to stop a subscription, to find complete terms and conditions for the campaign, and to access help.

3. The MMA also publishes "Mobile Advertising Guidelines" (Attachment D) to ensure that an ad campaign presents well on various forms of mobile devices and downloadable applications.

4. CTIA and the wireless industry have developed a set of content guidelines for content delivered over mobile devices (Attachment E). These guidelines require that wireless operators deploy access controls, such as content filters or parental controls, before offering "Restricted" content as that term is defined in the guidelines. These content guidelines were developed in response to concerns from subscribers about the need to be able to restrict content on mobile devices, particularly the devices used by subscribers' children. In fact, the Commission itself urged the wireless industry to adopt such content restrictions (Attachment F). Verizon Wireless asks a common short code applicant to assign a rating that applies to its campaign, just as it does for games or other materials it offers over its V CAST service. Subscribers who have selected a

content filter setting for a device will then not be able to send or receive messages as part of a short code campaign that has a rating that has been filtered out.

5. Finally, wireless operators undertake their own reviews of the CSC campaigns. This is essential because the advertising or other materials that wireless operators contract to place on their networks affect the image that the wireless companies wish to project to the market. It is also essential because wireless operators are targets of customer unhappiness with content that they did not want or do not think they should pay for. They are in this respect no different from any other "publisher" of content—a book or magazine publisher, a broadcast station or a newspaper—that determines what content it will accept.

B. Verizon Wireless' CSC Policies Are Designed to Protect Its Subscribers.

When deciding whether to enable a CSC campaign on its network, Verizon Wireless reviews the entire campaign, including the procedures used for subscriber opt-in and for stopping the campaign, the availability of clear terms and conditions and a help function, the price points for any premium content, and a sample of the actual content, texts and pictures that subscribers will get during the course of the campaign. Campaigns must follow the MMA best practices for enrolling and supporting subscribers and the CTIA content guidelines.[16]

Over the last three years, Verizon Wireless has enabled more than 3,000 CSC campaigns, including those mentioned above. Verizon Wireless' policies for activating CSC campaigns include the following guidelines:

Content: Verizon Wireless reviews the content of a common short code campaign consistent with its standards for content delivered through Verizon Wireless' other content distribution platforms such as V CAST. These standards preclude content that promotes the use

[16] *See id.* at 9 (discussing industry self-regulation of CSC campaigns).

of alcohol, tobacco products, guns or other weapons, and illegal drugs. They also restrict profanity, depictions of sexual activities, and violence. They place limits on the use of short codes to conduct contests and sweepstakes, given the many federal and state laws regulating this area. And, like other advertising platforms, they do not allow a competitor to use a short code to reach Verizon Wireless subscribers.[17] Under these standards, Verizon Wireless has declined to activate a small percentage (less than 5%) of common short code campaign proposals that it has received. Examples include the following:

- Ringtones with profanity and racial slurs available for purchase.
- Campaigns that promote the use of alcohol.
- Sponsors whose sites would make available copyright-protected material for purchase without appropriate safeguards. Thus Verizon Wireless declined to accept a ringtone campaign that would have allowed users to mix their voice and certain preset sounds on the sponsor's soundboard to create their own ringtones, downloadable to their phones and shared with other users. Such user-generated content runs the risk of users generating content with unlicensed copyrighted material without monitoring.
- A campaign that involved participant voting on a television dating show because the associated website for the sponsor featured a nude model on the initial page, chances to win dates with models and links to adult-themed websites.
- Similarly, Verizon Wireless has declined to launch several mobile content campaigns where the available wallpapers contain nude images, or where the content is accompanied by displays of parental advisories, and where ringtones contain profanity or glamorize drug use.
- Spamming can also occur through CSC campaigns, and Verizon Wireless will not launch a program that appears to promote spam. For example, some campaigns invite users to enter the phone numbers of third parties, who will then receive a text message through the campaign sponsor. Such text messages are unsolicited and can cost the recipient a text message charge. Accordingly, Verizon Wireless does not launch campaigns that include such functions.

[17] *Cf., e.g.,* FCC Mass Media Bureau, "The Public and Broadcasting," at 8 (noting that, except for certain classes of political advertising, broadcast stations are free to accept or reject any advertising) (June 1999).

Many campaigns initially have multiple discrepancies. For example, the opt-in flow may not conform to MMA guidelines, or there may be missing "help" or "stop" functions. While those issues are generally fixable, the content review may uncover problems with the terms and conditions of a sweepstakes or R-related content that may also prevent a campaign from being launched in its existing form. The process of approving a campaign thus can take the form of a dialog between Verizon Wireless and the aggregator to ensure that customers receive the appropriate charges and content.

Pricing: Due to complaints about high text message related charges, Verizon Wireless generally imposes a $9.99 limit on subscription charges, and a $100 limit per CSC, per subscriber, per month. The company has declined to activate campaigns involving higher premium charges. Premium content charges raise concerns in other areas: for example, federal and many states' sweepstakes laws require that there be no consideration from the participant for entry, or, if consideration is given for entry, that there be a free method of entry. However, recent court actions have challenged the legality of certain CSC contests where, even though there is a free method of entry, the text message sender allegedly has not received something of value for a premium charge associated with participation. Verizon Wireless has not launched campaigns where there is a premium charge associated with entry into a sweepstakes, unless the subscriber receives consideration for the premium charge.

Terms and Conditions: Verizon Wireless requires all campaigns to provide a complete set of the terms and conditions applicable to participation in the campaign and for incurring premium charges. These include compliance with applicable MMA guidelines on opt-ins, help, and stopping. Verizon Wireless has declined to activate campaigns when the terms and conditions as submitted are incomplete, out of date, or inconsistent with MMA guidelines. In many cases, it has initially not accepted a short code campaign when the campaign fails to show how it will meet the MMA guidelines. In some cases, the promoter modifies the campaign to show compliance; in other cases, Verizon Wireless simply does not hear back from the promoter.

C. NARAL and Rebtel CSC Campaigns

Out of the literally thousands of common short code campaigns that have been submitted to Verizon Wireless for review and implementation, Petitioners cite only two instances of short code denials as the basis for the sweeping regulation of text messaging and CSCs that they request: Verizon Wireless' initial decision not to enable the short code campaign of NARAL, and the decisions of Verizon Wireless and several other wireless operators not to enable a campaign by Rebtel. Neither of these isolated actions justifies the relief Petitioners request.

No text messages to or from NARAL were ever blocked by Verizon Wireless. In September 2007, Verizon Wireless initially declined to enable a CSC campaign that was submitted to the company by NARAL through a messaging aggregator. NARAL sent a letter via regular mail to the President and CEO of Verizon Wireless, dated September 25, 2007, asking him to reconsider the initial decision to reject the short code. Verizon Wireless first learned of the existence of NARAL's letter the next morning (September 26, 2007) when a New York Times reporter e-mailed a copy to Verizon Wireless' public affairs department asking for a response. That was the first time anyone at the company had seen NARAL's letter (the original letter in fact did not arrive until the postal service delivered it during the afternoon of September 26), and it was the first time anyone in Verizon Wireless management became aware of NARAL's underlying short code request. By the evening of September 26, Verizon Wireless management reversed the decision and directed the short code be activated the following day.

On September 28, the President and CEO of Verizon Wireless confirmed in a letter to the Hon. John D. Dingell, Chairman of the House Energy and Commerce Committee, that the company will accept any political and advocacy short code campaigns that are delivering legal content to customers who affirmatively indicate their desire to receive the content. (Attachment G.)

The NARAL episode demonstrates how the company immediately responded to the market. Under the relief the Petition seeks, NARAL would have had to bring a complaint to the Commission, and the agency would have had to devote its scarce resources to an inquiry or other proceeding. Yet here, the outcome NARAL desired was achieved overnight—without any Commission intervention. Far from demonstrating a problem worthy of Commission regulation, the NARAL example shows why government intrusion is not warranted.

Wireless operators' decisions regarding Rebtel—the only other example of a denial of a short code campaign offered by the Petition—also does not justify regulatory intervention. Rebtel sought to use short codes to set up international toll calls through a VOIP service that bypasses wireless operators' networks and the applicable international toll charges. Neither Verizon Wireless nor any other wireless operator is under an obligation to provide its subscribers with equal access to competing toll services,[18] and there is no obligation to facilitate a similar service reaching subscribers with a short code campaign. Generally, a business is not required to advertise for competitors or facilitate their ability to take away customers or business; this is no different.

[18] *See* 47 U.S.C. § 332(c)(8).

Petitioners' reference to the *Madison River* consent decree is misplaced in this context.[19] Unlike *Madison River,* Verizon Wireless is not purposefully blocking packet delivery or any other transmission between RebTel and its customers. RebTel can – and does – communicate with Verizon Wireless customers via text messaging services, internet-to-phone transmissions, or any other service that does not involve provisioning a short code.[20]

Similarly, it would be anomalous for the Commission to require a wireless operator to allow its competitors access to its network to advertise to, and poach, its subscribers. Broadcast radio and television stations are not obligated to air ads for other stations' programming. Newspapers are not obligated to accept ads for rival media outlets. The Petitioners are not obligated to place links on their websites to organizations with whom they disagree. The market for commercial promotional advertising is not, and never has been, nondiscriminatory. Wireless operators' decisions not to enable a short code campaign from a competitive service do not provide any basis to change those circumstances for one segment of the commercial advertising marketplace.

IV. GRANTING THE PETITION WOULD UNDERMINE THE INDUSTRY'S CONSUMER PROTECTION PRACTICES IN PROMOTING CSC CAMPAIGNS AND IN CONTROLLING SPAM.

A. Forcing Acceptance of All Short Code Campaigns Would Frustrate Legitimate Mobile Content Protections.

If, as Petitioners seek, activating CSCs were deemed a common carrier service, neither the MMA nor individual company guidelines for content, pricing and opt-in procedures would be enforceable by wireless operators. The self-regulatory guidelines imposed by the mobile content

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[19] *Madison River Communications, LLC*, 20 FCC Rcd 4295 (EB 2005). The case is also inapposite because it was brought under Section 201 in 2005, when Madison River's DSL transport service was still classified as a Title II service. The order does not purport to impose Title II obligations on an information service such as text messaging. Section V, *infra*, explains why text messaging is an information service.

[20] *See* http://www.rebtel.com/en/How-it-works (explaining how to use RebTel's service by text messaging a standard number).

and wireless industries have worked well to develop a new marketing channel without the same degree of concerns about unwanted messages, unauthorized charges, and widely available adult content that plague the Internet. Branding CSCs a common carrier service would strip away these protections.

The best practices guidelines developed by the MMA and wireless industry to review common short code campaigns provide consumers with some very basic and obvious protections. They give consumers the ability to control the campaigns to which they subscribe and the ability to start and stop subscription charges in accordance with the terms of the campaign. The MMA best practices require clear disclosures of the terms and conditions of a campaign and access to a "help" line for questions. Consumers also have some assurance that the content they purchase is what they were expecting to receive, and that there are no surprises in billing. Moreover, because Verizon Wireless takes responsibility for disputed charges, there is an established customer service organization responsible for resolving complaints.

The Petition requests a ruling that would effectively preempt these voluntary industry guidelines and prohibit wireless operators from denying an advertiser's or other third party's request that its short code campaign be implemented on their networks. If the Commission were to impose nondiscrimination requirements on the enabling of a CSC, the voluntary industry protections currently in place would evaporate. Persons and organizations leasing CSCs would not be subject to any standards or restrictions for providing content to mobile subscribers. Making content available from a variety of sources is an important goal, and CSC campaigns are expanding in scope to provide such services to consumers. But the Commission must recognize that imposing a nondiscrimination requirement on enabling CSCs will result in drastic changes to this product.

Perhaps the most striking change from current practices would be the immediate influx of legal, adult content campaigns, such as those flooding many Internet-based email in-boxes, that by voluntary decision of the wireless operators are not generally available today through short code campaigns.[21] The Commission is well aware that the development of 900 services quickly became the provenance of adult-oriented sites and generated substantial consumer complaints.[22] In part due to the Commission's application of common carrier requirements, carriers were able to exercise only limited control over those services. Congress and the Commission were forced to step in to reduce the abuses through a highly regulatory approach.

Other adverse changes in CSC campaigns would occur. Compliance with the voluntary industry guidelines would likely be limited to wireless companies' own campaigns. Beyond adult content, third-party campaigns could be used for content that could be embarrassing, degrading or counter to the brand or image of the mobile network on which the campaign appears. Wireless operators would be unable to review campaigns for procedural or content-oriented best practices. Nor could they disable a campaign, even if subscribers complain, without government intervention.

Under the regulatory environment requested by Petitioners, wireless operators could not take actions to shield subscribers from unwanted content and disreputable practices. Verizon Wireless would be unable to condition provision of short codes upon compliance with either the industry's or its own guidelines, and similarly would be unable to terminate campaigns that violated those guidelines. Consumer complaints, which today are usually resolved by a phone call to the wireless operator and removal of the disputed charge from the subscriber's bill, would

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[21] *See* Lowenstein, *supra* note 10, at 6-7 (discussing prevalence of mobile adult content in Europe and Asia).

[22] *See Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996*, 11 FCC Rcd 14738 (1996); 47 C.F.R. §§ 64.1501 et seq.

instead be directed to content providers, the Commission, the Federal Trade Commission, and state agencies, requiring litigation or administrative action to resolve even simple disputes.

Verizon Wireless takes seriously its commitment to protect customers' privacy, and to prevent as much as possible unwanted messaging, unauthorized charges, and fraudulent sales practices. The existing procedures for enabling CSC campaigns have produced a minimal number of unresolved complaints, and are being improved as the use of CSCs expands. In light of the steps the mobile content and wireless industries have taken to protect consumers, there is no reason for the Commission to substitute itself for the market in determining what wireless customers must be permitted to receive. Doing so would open the door to a repeat of the history of the "900" situation and frustrate the industry's self-regulation as well as harm wireless customers.

B. Imposing Nondiscrimination Requirements on Text Messaging and CSCs Would Impede Wireless Operators' Efforts to Curtail Spam.

As noted in Section I above, Verizon Wireless does not block or impede text messages sent by or addressed to its subscribers, except for those text messages that are captured by its spam filters, or those messages for which the subscriber has imposed an affirmative text message block. To protect its subscribers, the company does block and discard millions of text messages each year that are identified by its spam filters as unsolicited, mass messages, sent from specific Internet web sites to subscribers' telephone numbers. Verizon Wireless believes it is a valuable and necessary service to block text messages identified as spam from reaching subscribers' mobile devices. Imposing nondiscrimination requirements on SMS would interfere with Verizon Wireless' ability block spam and thereby provide the quality of text messaging that customers receive and expect.

Spammers send out bulk commercial text messages, as well as bulk commercial email messages on behalf of companies that engage their services. For example, an advertiser might contract with a company for distribution of content to a list of millions of mobile phone numbers. Such lists may be largely sequential, based on area code and exchanges assigned to mobile telephone numbers. The spammer uses equipment with the capacity to store or produce these telephone numbers using a random or sequential number generator and then transmits millions of unsolicited text messages to mobile phone users. Spam text messages frequently involve alleged stock tips, real estate "deals" and information on adult-themed entertainment.

Unsolicited text messages impose numerous costs on wireless subscribers. A subscriber may be billed for each text message sent or received, or each text message received may impact a subscription to a text bundle. Attempts by the wireless operator's network to deliver such mass messages may interfere with, and slow down, the delivery of wanted text messages to subscribers. Unsolicited text messages also invade the privacy of Verizon Wireless' customers, many of whom do not distribute their mobile telephone numbers to anyone. And, the malicious scams that have plagued the Internet are also showing up in SMS, e.g., "smishing," the text message form of "phishing," in which a text message disguised as a legitimate request from a financial institution asks the recipient to offer up personal account information.[23] Spam also damages Verizon Wireless' relationships with its customers and imposes customer service costs on Verizon Wireless when customers calls to have charges removed or to question the legitimacy of a message.

Verizon Wireless has committed substantial resources to detecting and mitigating the impact of text messages from companies that engage in spam and supporting its subscribers who

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[23] *See* K. Hart, "Advertising Sent to Cellphones Opens New Front in War on Spam," *The Washington Post*, A1 (Mar. 10, 2008).

have been harassed by such unsolicited messages. These resources include developing and purchasing software to detect and block messages from specific sources, tasking skilled personnel to investigate the source of such messages and to devise appropriate methods to counter these attacks, and providing information and support to subscribers who report being harassed by spam, including credits to their accounts where they have been charged for unsolicited commercial messages. Verizon Wireless has thus been able to block millions of unsolicited commercial electronic messages and to mitigate the impact of spam attacks on its subscribers.

But Verizon Wireless' text messaging servers, filtering system, and switching/transmission equipment have a finite processing speed and memory storage capacity that limits Verizon Wireless' ability to receive, sort, store, filter, and transmit messages. Spam thus can impair the delivery of legitimate messaging and the functioning of the network. When spammers launch attacks on Verizon Wireless' network and subscribers, they do so with a very high volume of messages in a very short period of time. The unpredictable nature of these high-volume attacks places enormous strain upon Verizon Wireless' systems. This strain can affect Verizon Wireless' ability to effectively provide text messaging service or the quality of that service.

As an example of the volume of spam, during one 10-week period in the Fall of 2007, Verizon Wireless estimates that its network received at least 350 million unsolicited text messages, of which approximately 1.75 million got through to customers' telephone numbers, and the rest were captured by our spam filters. Unsolicited text messages thus present an enormous problem for wireless operators and customers.

The imposition of nondiscrimination requirements on SMS would severely limit the steps that Verizon Wireless and other wireless operators can take to curtail text messaging spam. Filtering is based, in part, on identifying volumes and sources, and spammers use methods to mask the nature of their text messages in order to elude spam filters. To the extent that wireless operators cannot "discriminate" against a text message, the choices that wireless companies currently make to filter spam would be frustrated. The results could be a much lower quality of text messaging service to consumers, increased costs to wireless operators for dealing with customers about spam-related charges, and an open invitation for spammers to increase their harassment of consumers and networks.

Moreover, as currently configured, text messages from CSC campaign sponsors bypass the Verizon Wireless spam filters. The campaign sponsors and messaging aggregators are treated as trusted sources, precisely because Verizon Wireless has the opportunity to review the campaigns and messages they plan to offer subscribers. Therefore, if spammers could get access to common short codes, wireless carriers predictably would see a flood of unwanted or malicious text messages coming through short code campaigns, which would severely curtail the usefulness of this product to content providers and subscribers.

Nor is it an answer to simply assert that carriers may continue to block spam consistent with a common carriage obligation. It is far from clear that the spam discussed above is barred by federal law. The Commission's order implementing the CAN-SPAM Act forbids text-based spam to wireless numbers, but only if the message is "transmitted *to an electronic mail address* provided by a CMRS provider for delivery to the subscriber's wireless device."[24] It explicitly excludes from its scope phone-to-phone spam, internet-to-phone spam that does not use domain

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[24] *Rules and Regulations Implementing the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003,* 19 FCC Rcd 15927, 15932 (2004) (emphasis added).

names assigned by wireless operators for delivery of text messages to phones, or other methods of spam delivery to wireless handsets.[25]

Similarly, although the Commission has applied the Telephone Consumer Protection Act (TCPA) to block certain types of text messaging spam to wireless numbers,[26] the statute is limited to messages that use an automated dialing system or an artificial or prerecorded voice message. The TCPA in turn defines "automated telephone dialing system" as equipment that dials numbers "using a random or sequential number generator."[27] At least one court has held that if text-based spam is sent without using a random or sequential number generator—for example, if the spammer collects wireless numbers from a database or other collection—the TCPA does not forbid the transmission.[28] In other words, Verizon Wireless' spam-blocking efforts likely provide consumer protection beyond the federal statutory baseline, and these additional efforts would be curtailed by the imposition of common carrier obligations on text messaging services.

V. TEXT MESSAGING AND THE PROVISIONING OF COMMON SHORT CODES ARE NOT TELECOMMUNICATIONS SERVICES, AND ARE THUS NOT SUBJECT TO SECTION 202.

The Petition should be denied for legal as well as policy reasons. Petitioners argue that text messaging and CSC campaigns are telecommunications service subject to Title II obligations, or, if deemed Title I services, should still be subject to Section 202 nondiscrimination requirements. Legally, there is no basis for either of these positions.

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[25] *Id.* at 15933-34.

[26] *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991,* 18 FCC Rcd 14014, 14115 (2003).

[27] *See* 47 U.S.C. § 227(a)(1).

[28] *Satterfield v. Simon & Schuster,* No. C 06-2893 CW, 2007 WL 1839807 (N.D. Cal. 2007).

A. Text Messaging Is an Information Service, Not a Telecommunications Service.

The Petition first seeks a declaratory ruling that SMS is subject to Title II regulation. But "[o]nly those services which are considered to be 'telecommunications services' are subject to regulation under Title II."[29] Text messaging is not treated as a telecommunications service.[30] Text messaging does not fit the Act's definition of a telecommunications service: "the offering of telecommunications," which is, in turn, "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[31] Text messaging is properly classified as an information service, not a telecommunications service, and therefore is subject only to the Commission's limited Title I authority.

The Communications Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, retrieving, utilizing, or making available information via telecommunications."[32] Verizon Wireless' text messaging service requires the "storing" and "retrieving" of information, both when delivering messages between individual consumer handsets and when allowing subscribers to retrieve information such as news, alerts, or reminders from a content provider's central information database. Text messaging also involves "transforming" message content, by adding identifying information and undertaking net protocol conversion to transmit a message to other networks or the Internet. These characteristics are essential to the SMS system and place text messaging squarely within "information service" as defined under Commission precedent.

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[29] *Implementation of Section 255 of the Telecommunications Act of 1996*, 13 FCC Rcd 20391, 20410, ¶ 36 (1998); *see also Federal State Joint Board on Universal Service,* 17 FCC Rcd 24952, 24974 n.111 (2002) ("[S]ections 201 and 202 of the Act only apply to 'common carriers' or 'telecommunications carriers.').

[30] *Pleading Cycle Established for Eligible Services List for Universal Service Mechanism for Schools and Libraries*, 21 FCC Rcd 8412, 8420 (2006) (USAC Eligible Services List).

[31] 47 U.S.C. § 153(43).

[32] 47 U.S.C. § 153(20).

Storage and Retrieval: The Commission has consistently cited computer-based storage and retrieval as the classic hallmarks of an "information service." In its *Computer II* Order, the Commission made clear that except where necessary to convey a message in real-time, the need for storage exempted a mobile service offering from classification as a "basic" service: "In the provision of a basic transmission service, memory or storage within the network is used *only* to facilitate the transmission of the information from the origination to its destination, and the carrier's basic transmission network is *not* used as an information storage system. Thus, in a basic service, once information is given to the communication facility, its progress towards the destination is subject to only those delays caused by congestion within the network or transmission priorities given by the originator."[33]

In the 1998 *Stevens Report*, for example, the Commission invoked storage and retrieval capabilities in concluding that e-mail constitutes an "information service":

> [E]lectronic mail utilizes data storage as a key feature of the service offering. The fact that an electronic mail message is stored on an Internet service provider's computers in digital form offers the subscriber extensive capabilities for manipulation of the underlying data. The process begins when a sender uses a software interface to generate an electronic mail message (potentially including files in text, graphics, video or audio formats). The sender's Internet service provider does not send that message directly to the recipient. Rather, it conveys it to a "mail server" computer owned by the recipient's Internet service provider, which stores the message until the recipient chooses to access it.[34]

The Report noted that a user "may not exploit this feature of the service offering; indeed, two users with direct Internet connections can communicate via electronic mail in close to real-time.

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[33] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 FCC 2d 384, 420, ¶ 95 (1980) ("Computer II Order") (emphasis added); *see also Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2697 (2005) (characterizing "basic" service as involving "a communications path that enable[s] a user to transmit an ordinary-language message to another point, with no computer processing or storage of the information, other than the processing or storage needed to convert the message into electronic form and then back into ordinary language for purposes of transmitting it over the network").

[34] *Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, 11538-39, ¶ 78 (1998) ("*Stevens Report*").

Nonetheless, it is central to the service offering that electronic mail is store-and-forward, and hence asynchronous; one can send a message to another person, via electronic mail, without any need for the other person to be available to receive it at that time."[35]

Like e-mail, text messages are delivered over a system that uses storage and retrieval. When a subscriber sends a text message to a common short code, a standard ten-digit phone number, or an e-mail address, the text is initially routed to a short messaging service center (SMSC), where it is stored while the system attempts to locate the intended recipient. The network flow and storage of an incoming message is as follows:

- The message travels from one of two SMPP (short message peer-to-peer protocol) gateways to the SMSC server. The SMSC needs to find where the receiving handset is physically located and therefore stores the message while sending another message over the SS7 network to the Home Location Register ("HLR"), which tracks handsets.

- The HLR sends a message back to the SMSC identifying the customer location. If the phone is turned off or is out of the service area, the HLR informs the SMSC that the phone is not registered.

- Once the SMSC receives an acknowledgement from the HLR that the receiving unit is ready for delivery, it sends a message to the Mobile Switching Center ("MSC") that covers the market where the receiving handset is located.

- If the message is very short, it is delivered over the "paging" channel (which is the same process used to send rings to a customer indicating an incoming call). If the message is longer, the voice channel is used to send the message.

- If the HLR cannot find the customer (for example, if the phone is turned off or out of the service area), the HLR replies to the SMSC and the message must be stored for a longer period. Depending on the error code, a retry algorithm is initiated. During the retry effort, the message is stored by the SMSC. The message will be stored for redelivery up to five days and then deleted if not successfully delivered. While most messages are delivered quickly, *every* message is stored for some period of time until the SMSC receives confirmation that the receiving handset is active and ready to retrieve the message. If the receiving mobile is not SMS capable, the message is automatically deleted.

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[35] *Id.* at 11539 n.161.

- Handset-to-Internet text messages are delivered to an Internet gateway and routed in the same manner as an email message.

- Even after delivery, messages are stored on the server for up to ten days, during which they may be retrieved for purposes such as law enforcement.

- Messages can be stored indefinitely on a customer's handset. The customer can edit the message, forward it to others, reply by text, or even reply by voice by clicking the associated phone number on the message.

Text messaging is therefore very different from basic telecommunications service, such as voice or facsimile transmission. When a sender initiates a telephone call or fax transmission, the sending device transmits only signaling information to confirm that a circuit may be opened to the recipient. Once the circuit is opened, the sender's content is then transmitted from sender directly to recipient. In contrast, a text message is always stored for at least a short period of time—and sometimes for hours or even days—before it is transmitted to its ultimate destination, and subscribers rely upon this storage capability when out of range, traveling by airplane, or otherwise unavailable to receive the message. Even where the receiving handset is active and users can communicate in "close to real-time," the essential service is "store-and-forward, and hence asynchronous." Because "one can send a message to another person . . . without any need for the other person to be available to receive it at that time,"[36] SMS constitutes an information service under existing Commission precedent.[37]

Verizon Wireless' text messaging services also allows subscribers to "retrieve" data in another sense, by querying certain electronic databases. When used in this way, the subscriber sends a text message to retrieve information that has been pre-loaded into a central database, such as automatic alerts, sports scores, weather updates, and other information. In *Talking Yellow Pages*, the Commission found that a similar service involving "customer interaction with

[36] *Id.*
[37] *See also* Lowenstein, *supra* note 10, at 11-12 (explaining how store-and-forward characteristics of text messaging differ from voice calls).

stored information" should be classified as enhanced rather than basic service, and therefore not subject to Title II common carrier regulation, even though the Talking Yellow Pages provider was a common carrier for other basic services.[38] Because SMS similarly allows subscribers to retrieve or make available information via telecommunications, it is properly classified as an information service.

Protocol Conversion: The Commission also has repeatedly held that services involving "net protocol conversion" are "enhanced services."[39] Describing its *Computer Inquiry* framework, the Commission has explained that "generally, services that result in a protocol conversion are enhanced services, while services that result in no net protocol conversion to the end user are basic services."[40] Since 1996, the Commission has made clear that services involving net protocol conversion also constitute "information services" under the Act, because such conversion involves the "transforming" of information.[41] And in the *Stevens Report*, the Commission confirmed that an "information service" designation might depend, among other things, on whether the service under review involves a "net change in form or content."[42]

In many cases, the transmission of text messages involves protocol conversion. The Commission has defined "protocol conversion" to refer to "the specific form of protocol

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[38] *Northwestern Bell Telephone Company Petition for Declaratory Ruling ("Talking Yellow Pages")*, 2 FCC Rcd 5986, 5988, ¶¶ 19-20 (1987) (citing 47 C.F.R. § 64.702), *vacated as moot,* 7 FCC Rcd 5644 (1992).

[39] *See, e.g., Amendment of Section 64.702 of the Commission's Rules and Regulations*, 72 FCC 2d 358 (1979); *Computer II Order,* 77 FCC 2d at 421-22, ¶ 99. *See generally* 47 C.F.R. § 64.702 (noting that enhanced services "employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information").

[40] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457, 7459, ¶ 4 (2004).

[41] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* 11 FCC Rcd 21905, 21955-56, ¶ 102 (1996) ("*Non-Accounting Safeguards Order*") (concluding that "the differently-worded definitions of 'information services' and 'enhanced services' ... should be interpreted to extend to the same functions"); *id.* at 21956-57, ¶¶ 104-105 (finding that protocol processing services that had qualified as "enhanced" under the Computer Inquiry framework should be treated as "information services" under the 1996 Act framework).

[42] *See Stevens Report,* 13 FCC Rcd at 11543-44, ¶ 88; id. at 11527, ¶ 51 (noting that "services employing protocol processing were treated as information services under the MFJ").

processing that is necessary to permit communications between disparate terminals or networks."[43] Because wireless operators use different formats and protocols, the text messaging system requires a significant amount of such net protocol conversion, without any direction from the user, to permit the transmission of text messages from one wireless network to another. For example, Verizon Wireless may truncate an intercarrier text message if it arrives in 7-bit rather than 8-bit coding, and also must process it through a message aggregator to adjust for different formats used by different wireless operators (such as the use of foreign language accents or other special characters). When sending to or receiving from the Internet, Verizon Wireless must translate the message between the RFC-822 Internet email protocol and a format or protocol used for text message transmission over wireless networks. Finally, accessing CSC campaigns typically involves significant transformation of the information, due to the processing and possible aggregation of customer requests and content provider responses. As a result, a text message originating from or sent to a non-Verizon Wireless destination could look very different between sending and receipt. These various changes and translations constitute "protocol conversion," which is the "transformation" of information (and thus an information service).[44]

Even for text messages that stay *within* the Verizon Wireless network, the company changes the form or content of messages between sending and delivery. For example, Verizon Wireless adds headers, callback numbers, dates, and other information to the message the sender typed before delivering it to the receiving handset. If the sender is listed with a nickname in the recipient's address book, the system will automatically display that nickname as well. As a

[43] The Commission first enunciated this definition in the 1995 Frame Relay Order. *See Independent Data Communications Manufacturers Ass'n, Inc.* 10 FCC Rcd 13717, 13717-18 n.5 (1995). The Commission has since employed that definition in several orders. *See, e.g.*, *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955 n.229; *Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, As Amended*, 14 FCC Rcd 14409, 14435 n.134 (1999).

[44] 47 U.S.C. § 153(20).

result, even text messages that do not undergo protocol conversion nonetheless experience a "change in the form or content of the information as sent and received," again meaning a text messaging service cannot be telecommunications under the Act.

B. Text Messaging Is Also Not a Commercial Mobile Radio Service.

Petitioners also attempt to categorize text messaging as a common carrier service by attempting to shoehorn it into the definition of Commercial Mobile Radio Service ("CMRS") in Section 332 of the Act.[45] But text messaging fails to satisfy this regulatory definition, for the same reasons that the Commission found that wireless broadband service is not CMRS: SMS is not an interconnected service, and even if it is, its status as a mobile *information* service precludes its classification as CMRS.

As the Commission noted in its *Wireless Broadband Ruling*, a CMRS service must give the end user the capability "to communicate to or receive communications from *all other users* on the public switched network."[46] Text messaging does not provide this interconnected capability. Standing alone, text messaging only gives a subscriber the capability to interact via text messaging with other SMS-enabled devices. Without reliance on some other service, the subscriber has no capability to reach landline phones. In terms of "interconnecting" users to the public switched network, a text messaging service is not equivalent to either mobile or landline phone service. As a result, text messaging cannot be deemed CMRS.

The classification of text messaging as an information service also precludes its classification as CMRS. In the *Wireless Broadband Ruling*, the Commission determined that even if a service is interconnected, it is "not included in the commercial mobile service

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[45] Pet. at 7-13.

[46] *Appropriate Regulatory Treatment of Broadband Access to the Internet over Wireless Networks,* 22 FCC Rcd 5901, 5916 (2007) ("Wireless Broadband Ruling") (quoting definition of "interconnected service" in 47 C.F.R. § 20.3).

definition" if it constitutes a mobile information service. The ruling explained that this "exclusion is consistent with and furthers the Act's overall intent to allow information services to develop free from common carrier regulations."[47] Because text messaging similarly constitutes a mobile *information* service, Commission precedent shields it from Title II regulation for this reason as well.

Petitioners' reference to the Commission's 2007 Order that imposed an automatic roaming requirement on wireless operators in certain situations to suggest otherwise is misplaced. The Commission did *not* find that SMS is an interconnected service, but rather is an "interconnected feature[] or service[] in some instances, but non-interconnected in others, depending on the technology and network configuration chosen by the carriers."[48] The order neither classified SMS as CMRS nor otherwise found it was a common carrier service.

C. Enabling Common Short Codes Is Neither a Title II Nor a Title I Service.

To the extent that the Petition requests regulation of wireless operators' provisioning of common short codes to advertisers and other third parties, it has a more fundamental problem: common short code provisioning lies completely outside the Act. The Commission's Title II authority extends only to the provision of telecommunications service, as noted above, while Title I provides limited jurisdiction to regulate other communications by radio and services or apparatus incidental to such communications. But a wireless operator's decision to accept or reject a messaging aggregator's request on behalf of an advertiser or other third party to activate a common short code does not involve the provision of *any* service using communications to *any* subscriber. As a result, a wireless operator's decision whether to activate such a code lies beyond the Commission's regulatory reach.

[47] *Id.* at 5920.

[48] *Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers*, 22 FCC Rcd 15817, 15837 (2007).

Importantly, the decision to enable a common short code does not itself create a transmission of information over the wireless operator's network. Rather, the provision of a common short code is a contractual arrangement with a messaging aggregator – not a customer. When effectuated, this arrangement is neither necessary nor sufficient to connect subscribers to the content provider. The wireless operator does not provide any communications service to the content provider as a result of the activation of the code; indeed, the wireless operator usually is not even in privity with the content provider, which must contract with a separate communications provider for communications service to and from its premises. Moreover, Verizon Wireless does not collect a fee to review a CSC application or to activate a code.

"Under the statute, the heart of 'telecommunications' is transmission."[49] Because activation of a common short code involves no offer or provision of a transmission service, it does not constitute telecommunications service under Title II.[50] The Petition does not seem to argue otherwise. Petitioners' argument that the enabling of a short code constitutes CMRS fails for the same reasons that text messaging is not CMRS: A common short code is used only to register delivery of content to SMS-enabled mobile handsets. CSCs do not work with non-SMS-enabled phones, and do not work on landline phones at all. Because the common short code holder lacks the capability to send and receive messages to "all other users" on the public switched telephone network,[51] CSCs are not CMRS and are not subject to common carrier regulation.

The provision of common short codes also lies beyond Title I. Title I limits the Commission's jurisdiction to "the transmission by radio of writing, signs, signals, pictures, and

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[49] *Petition for Declaratory Ruling that Pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307, 3312 (2004).

[50] *See* 47 U.S.C. § 153(43); *id.* § 153(46).

[51] 47 C.F.R. § 20.3.

sounds of all kinds" and "instrumentalities, facilities, apparatus, and services. . .incidental to such transmission."[52] As noted above, the provision of a short code is not a transmission service and therefore is not a "transmission by radio." Nor is it incidental to such transmission. The Seventh Circuit has rejected the notion that the Commission may regulate "any and all activities that 'substantially affect communications'" regardless of whether the activity "actually involv[es] the transmission of radio or television signals."[53] Rather, there must be some nexus between the activity to be regulated and the transmission of a radio signal. In the analogous case of apparatus incidental to communication, the D.C. Circuit has explained that "at most, the Commission only has general authority under Title I . . . *while those apparatus are engaged in communication*."[54] Citing this decision, the Commission has explained that a particular object is "incidental to [a] transmission" if it is "an integral and necessary part of" the communication.[55] The provision of a short code is neither integral to nor necessary for communication by radio between a subscriber and a content provider: the activation of the code occurs prior to any transmission, and denial of a short code application does not prohibit a content provider from soliciting subscribers via text messaging. As a result, the enabling of the code is not "incidental to" a transmission and thus lies beyond Title I.

D. Enabling Short Codes Is Not Subject to the Broadband Policy Statement.

The Commission should also reject Petitioners' suggestion that the Broadband Policy Statement captures the provision of common short codes.[56] First, short code campaigns are not

[52] 47 U.S.C. § 153(33).

[53] *Ill. Citizens Comm. for Broadcasting v. FCC*, 467 F.2d 1397, 1400 (7th Cir. 1972).

[54] *Am. Lib. Ass'n v. FCC*, 406 F.3d 689, 704 (D.C. Cir. 2002) (emphasis added).

[55] *IP-Enabled Services*, 22 FCC Rcd 11275, 11288, ¶ 23 & n.98 (2007); *see also Continental Airlines*, 21 FCC Rcd 13201, 13219 (2006) (same).

[56] As the Commission noted therein, the Broadband Policy Statement offers "guidance and insight into its approach to the Internet and Broadband." *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Policy Statement,* 20 FCC Rcd 14986, 14987 (2005) ("Broadband Policy Statement").

accessed via, nor related to, a broadband Internet access service, nor are they Internet-based, as the Petition acknowledges.[57] Text messages to and from an activated short code occur on the wireless operator's network, not over the Internet. The policies developed to guide the provision of content on the Internet are inapt. Second, the Policy Statement does not apply to wireless services. It was adopted pursuant to several Commission proceedings that concerned only cable and wireline services. Third, CSC campaigns must be activated separately on each participating carrier's network; provisioning short codes does not implicate creating connections to other networks for consumers to reach content. Fourth, charges for CSC campaign content are incurred and billed to the subscriber by the wireless operator, rather than by the third-party vendor, meaning the wireless company has a reputational stake in the transactions facilitated by CSC campaigns, unlike an ISP whose charge for access, if any, is billed and paid separately from the charges that users may incur for content on the Internet. Fifth, CSC campaigns developed within an environment in which the industry sought to self-regulate access and content to avoid the inherent problems that ubiquitous, mobile content delivery would raise. As a result, the mobile content industry has been largely successful in avoiding problems such as access to adult material by minors that have plagued the Internet. Those concerns would be unleashed on wireless subscribers should Broadband Policy Statement requirements be imposed on the provision of common short codes.

VI. THE COMMISSION DOES NOT HAVE AUTHORITY TO IMPOSE TITLE II NONDISCRIMINATION REQUIREMENTS ON WIRELESS OPERATORS' PROVISION OF TEXT MESSAGING OR THE INITIATION OF SHORT CODE CAMPAIGNS.

Petitioners have also asked the Commission to exercise its ancillary authority to declare that Section 202's nondiscrimination requirement applies to text messaging and the provision of

[57] *See* Pet. at 10-11.

CSCs. The Commission should reject this request. Even assuming that the provisioning of short codes to third party content providers is somehow subject to the Act (which, as Section B above shows, it is not), there is no lawful basis for the Commission to bypass the limitations of Title II and find that Section 202 can be imposed pursuant to Title I of the Act.

A. The Commission Cannot Exercise Ancillary Jurisdiction by Declaratory Ruling.

As an initial matter, the Petition fails to acknowledge the "difference between a declaratory ruling proceeding and a rulemaking. The former clarifies the *existing* state of the law, while the latter establishes *new* rules."[58] The Title I relief Petitioners seek cannot be granted through a declaratory ruling because any exercise by the Commission of ancillary jurisdiction would be inherently prospective: it would not attach until the Commission decides, in its discretion, that "the assertion of jurisdiction is reasonably ancillary to the effective performance of its various responsibilities."[59] The Commission has often found a service subject to Title I yet declined to exercise its discretion because the record failed to show that Commission intervention was necessary.[60] Here, the Petition acknowledges that the Commission has not previously decided that Title I regulation of text messaging – let alone the initiation of common short codes campaigns – is warranted. The Commission cannot now declare as a matter of existing law that nondiscrimination obligations currently attach to these services, particularly in light of Commission precedent precluding common carrier treatment of information services. "The development and application of such an approach is a broad policy change that is appropriately

[58] *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd at 7476 (separate statement of Commissioner Abernathy) (emphasis in original).
[59] *Review of the Emergency Alert System*, 22 FCC Rcd 13275, 13297, ¶ 48 (2007) (internal brackets and citation omitted).
[60] *See, e.g., Detariffing of Billing and Collection Services*, 102 FCC 2d 1150, 1169-71, ¶¶ 35-38 (1986).

done in a *rulemaking* proceeding, not in a *declaratory ruling*."[61] For this reason alone, Petitioners' request must be denied.

B. The Commission Lacks Authority Under Title I to Impose Section 202 Requirements on Non-Common Carrier Services.

In addition to this threshold issue, the Petition must be denied because the Commission lacks authority under Title I to impose Section 202 obligations on a non-telecommunications service. The Supreme Court's decision in *FCC v. Midwest Video Corp.*[62] delimits the scope of the Commission's Title I powers: The service in question must fall within Title I's general subject matter jurisdiction and the regulation in question must be "reasonably ancillary to the effective performance of the Commission's various responsibilities."[63] In *Midwest Video*, the Commission sought to force certain cable operators to make channels available to third-party access on a nondiscriminatory basis and to provide facilities supporting that access.[64] The Court held that, while cable services undoubtedly lay within Title I, the Commission's rule was not "reasonably ancillary" to a Commission objective because it was antithetical to a specific statutory prohibition. By requiring the cable companies to "hold out dedicated channels on a first-come, nondiscriminatory basis," the Commission "in effect compel[led] the cable system to provide a kind of common-carrier service."[65] But elsewhere the statute explicitly directed the Commission not to treat broadcasters as common carriers.[66] Although the Court acknowledged that the statute did not explicitly apply to cable operators, it explained that, "without reference to

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[61] *Request of MCI Communications Corporation British Telecommunications plc*, 9 FCC Rcd 3960, 3965, ¶ 26 (1994) (emphasis added).
[62] 440 U.S. 689 (1979) (internal quotation marks and citation omitted).
[63] *Id.* at 697.
[64] *Id.* at 691-92.
[65] *Id.* at 700.
[66] *Id.* at 702.

the provisions of the Act directly governing broadcasting, the Commission's jurisdiction under [Title I] would be unbounded."[67]

Text Messaging. Under *Midwest Video,* the Commission cannot use its Title I authority to impose Section 202 obligations upon text messaging services. As in *Midwest Video*, the imposition of a nondiscrimination obligation on text messaging services is not "reasonably ancillary" to a Commission objective because it is antithetical to a statutory prohibition. The nondiscrimination requirement in Section 202 lies at the heart of the common carrier regime; as *Midwest Video* noted, foisting such obligations upon a service relegates it "*pro tanto,* to common-carrier status."[68] But the Communications Act explicitly directs that a "telecommunications carrier shall be treated as a common carrier under this Act *only* to the extent it is engaged in providing telecommunications services."[69] The Commission has explicitly and repeatedly recognized that Congress "inten[ded] to maintain a regime in which information service providers are not subject to Title II regulation as common carriers"[70] and has found that providers of non-telecommunications services "are exempt from mandatory Title II common carrier regulation."[71] Because the imposition of a non-discrimination obligation on text messaging would contravene an explicit statutory prohibition against subjecting information services to common carriage obligations, Section 202 treatment is not reasonably ancillary to a Commission objective.

Short Codes. Similarly, the Commission lacks authority under Title I to subject the initiation of common short code campaigns to Section 202. In this case, the first step of the

[67] *Id.* at 706; *see also Am. Library Ass'n*, 406 F.3d at 701.
[68] *Midwest Video*, 440 U.S. at 700-01.
[69] 47 U.S.C. § 153(44) (emphasis supplied).
[70] *Wireless Broadband Ruling*, 22 FCC Rcd at 5916.
[71] *Id.* at 5903; *see also Brand X,* 545 U.S. at 975 ("[T]he Act regulates telecommunications carriers, but not information service providers, as common carriers.").

Midwest Video test blocks any assertion of jurisdiction: as discussed above, Title I does not cover the provision of common short codes. But even if it did, the provision of CSCs could not be subject to common carrier obligations for the reasons outlined above.[72] The statute and applicable precedent wall off non-telecommunications services from such regulation, and therefore compel the conclusion that the Commission cannot rely on Title I ancillary authority to impose common carrier obligations on wireless services expressly found to be immune from common carrier regulation.

C. The Petition Fails to Demonstrate a Problem Warranting the Exercise of the Commission's Title I Authority.

Even where the Commission has discretion to act under Title I, it will not exercise that discretion absent "a record finding that such regulation would be directed at protecting or promoting a statutory purpose."[73] Petitioners have failed to provide any evidence of an ongoing, systemic problem with respect to text messaging or the provision of CSCs worthy of Commission precedent. Petitioners rely entirely on two examples from the provisioning of short codes, and none from the delivery of text messages. One example was immediately addressed without Commission intervention, and the other has many reasonable and legitimate precedents for the same result, not requiring a business to carry advertising for a competitor. From these, Petitioners speculate about a variety of other forms of discrimination in which wireless operators hypothetically *might* engage. This is a wholly inadequate foundation for prescriptive regulation. As discussed above, wireless companies are following reasonable and pro-consumer policies

[72] In any event, Verizon Wireless has not held itself out as offering to provision a common short code indifferently for all persons or organizations. Therefore, it has never treated this product as a common carrier service. *See National Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal"), *cert. denied*, 425 U.S. 992 (1976). And, as discussed in the text at notes 100-102, the market for CSC campaigns is growing rapidly without government regulation.

[73] *Detariffing of Billing and Collection Services,* 102 FCC 2d at 1170, ¶ 37 (internal quotation marks omitted).

with respect to text messaging and the provision of CSCs. Far from enhancing consumer protection, Commission imposition of nondiscrimination obligations would hurt consumers by hindering the various initiatives that wireless operators have taken to shield their subscribers from possible abuses by the operators of common short codes.

VII. THE RELIEF PETITIONERS SEEK WOULD VIOLATE THE FIRST AMENDMENT RIGHTS OF WIRELESS OPERATORS.

The Commission should also reject Petitioners' invitation to exercise its Title I discretion to impose common carriage obligations because any such action would violate the First Amendment. Petitioners argue that Section 202 obligations are needed to protect "new modes of speech,"[74] but they have the First Amendment issue precisely backward: the non-discrimination duty they propose would undercut the free speech rights of *wireless operators*.[75] In managing short code campaigns, wireless operators exercise editorial discretion by choosing to feature certain content, while refraining from providing other content. Under settled principles, such activity constitutes expression protected by the First Amendment.[76] Because a duty of non-discrimination would preclude wireless operators from making editorial judgments and indirectly burden their interests as speakers, that duty must satisfy searching constitutional review—at least

[74] Pet. at 19.

[75] *Cf. Motion Picture Ass'n of Am., Inc. v.* FCC, 309 F.3d 796, 805 (D.C. Cir. 2002) (holding that rules requiring broadcasters to provide video content for blind customers were outside the Commission's Title I authority, in part because regulation of content raises serious First Amendment issues); *Audio Communications, Inc. Petition for a Declaratory Ruling that the 900 Service Guidelines of US Sprint Communications Co. Violate Section 201(a) and 202(a) of the Communications Act*, 8 FCC Rcd 8697, 8700-02, ¶¶ 30-31 (1993) (noting that First Amendment prohibition does not apply "to business decisions by private entities," and rejecting petitioners' request to exercise Title I jurisdiction in order to impose Section 202 obligations, in part because the challenged action did not "harm First Amendment values," as the petitioners contended).

[76] *See, e.g., Emergency Complaint of Dennis Kucinich,* DA 08-136, ¶ 2 (MB Jan. 18, 2008) ("The First Amendment of the U.S. Constitution and federal law generally prohibit the Commission from involving itself in the content of specific broadcast or cable television programs or otherwise engaging in activities that might be regarded as censorship of programming content.").

intermediate scrutiny.[77] In addition, a court would accord the Commission no *Chevron* deference given the presence of a serious constitutional question surrounding its actions.[78]

The record before the Commission makes clear that common carrier requirements for short code provisioning cannot meet this test. There is no record of any market dysfunction or injury to competition that could justify access mandates for mobile content providers. Nor have Petitioners shown that common carrier regulation for text messaging and the provision of short codes would advance the interests they purport to serve; Petitioners have offered no evidence that consumers or content providers would broadly prefer text message and short code environments free of content restrictions, and the factual record is strongly to the contrary. The imposition of a cross-cutting requirement of nondiscrimination would also burden substantially more speech than necessary, for Petitioners have failed to challenge, much less refute, the less restrictive alternatives at the Commission's disposal.

A. The Common Carriage Duties Urged by Petitioners Would Impinge Upon the Wireless Operators' First Amendment Right to Exercise Editorial Discretion on Their Networks.

The relief sought by Petitioners would directly burden the right of wireless operators to exercise editorial control over the campaigns that use their short code offerings. Wireless operators impose substantive requirements on short code campaigns and restrict the content that may be delivered via short codes. These restrictions are intended to ensure that customers are able to receive the messages and content they want, while protecting them from unwanted and potentially offensive and fraudulent material. The judgments made by the wireless operators about which short code campaigns to enable reflect the kind of discretionary content control that has long been protected by the First Amendment. By imposing common carriage requirements,

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[77] *See id.* at ¶ 5 (explaining that for the Commission to require a cable network to include a candidate in a political debate "is prohibited . . . as censorship of programming content").

[78] *See Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

the Commission would strip Verizon Wireless and other wireless operators of this constitutionally-protected discretion.

"The editorial function itself is an aspect of speech."[79] The Supreme Court has recognized, for example, that the First Amendment protects a newspaper's decisions about which articles or advertisements to publish,[80] and decisions made by cable operators about which channels to offer on their networks.[81] This speech interest applies regardless of whether the editor itself produces the content or acquires it from third parties, because the First Amendment does not "require a speaker to generate, as an original matter, each item featured in the communication."[82]

Editorial Control is Central to Wireless Operators' Management of Common Short Codes: Verizon Wireless and other wireless operators exercise editorial discretion over content when provisioning short codes. Any third-party seeking to activate a short code on Verizon Wireless' network must submit an application detailing its proposed short code campaign. The application must include examples of the content, texts, and images the third party seeks to transmit to Verizon Wireless customers, as well as the disclosures and notices it plans to make to consumers. Verizon Wireless reviews this application for compliance with industry guidelines *and* its own guidelines, both of which include requirements and restrictions on campaign content.

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[79] *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 727, 737 (1996) (plurality).

[80] *See Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (holding that "[t]he choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper" are protected by the First Amendment."); *New York Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964) (protecting publication of a paid noncommercial advertisement).

[81] *See City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 494 (1986) ("[T]hrough original programming or by exercising editorial control over which stations or programs to include in its repertoire, [a cable operator] seeks to communicate messages on a wide variety of topics and in a wide variety of formats."); *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 637 (1994) ("*Turner I*") ("Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."); *accord Denver Area*, 518 U.S. at 822 (Thomas, J., concurring in part and dissenting in part) ("In my view, the constitutional presumption properly runs in favor of [cable] operators' editorial discretion [as against cable programmers], and that discretion may not be burdened without a compelling reason for doing so.").

[82] *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 570 (1995); *cf. Sullivan*, 376 U.S. at 266.

The industry has also established guidelines for communications between content providers and CSC customers—guidelines that seek to protect consumers.[83] Thus, for example, MMA guidelines provide that CSC campaigns should disclose contact, program, and pricing information (when relevant) as part of the procedures for opting into the content provider's program.[84]

The industry guidelines are supplemented by Verizon Wireless' own restrictions on, and requirements for, content offered to customers through short code campaigns. Verizon Wireless currently bars short code campaigns promoting products that are illegal or unsuitable for minors, such as alcohol, tobacco products, guns, or drugs. It limits the use of profanity and depictions of sexual activity and violence, and restricts the use of short codes to conduct contests and sweepstakes that are subject to federal and state regulation. Finally, Verizon Wireless, like many other major wireless operators, does not enable its competitors to use short codes on its network.

Wireless Operators' Judgments About CSC Campaigns Are Imbued with Protected Expression: The editorial decisions made by wireless operators when enabling common short codes are comparable to the discretionary judgments of cable operators, broadcasters, and other media in which editorial control is "inherent" in the media's "usual functioning."[85] Just as cable operators "exercis[e] editorial discretion over which stations and programs to include in [their] repertoire,"[86] so too have wireless operators decided to define the types of content that can be included in short code campaigns. They impose disclosure and notice obligations designed to

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[83] Attach. C, at 5-13.

[84] *Id.* at 5-12

[85] *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 543 (2001) (discussing broadcasting). Courts, for example, have noted that programming decisions made by satellite broadcasters also are protected by the First Amendment. *See Satellite Broad. & Communications Ass'n v. FCC*, 275 F.3d 337, 352-53 (4th Cir. 2001) (explaining that "[s]atellite carriers, like cable operators, function primarily as conduits for the speech of others," and that they "engage in speech protected by the First Amendment when they exercise editorial discretion over the menu of channels they offer to their subscribers").

[86] *Turner I*, 512 U.S. at 636 (internal quotation marks and citation omitted).

ensure that consumers' short code choices are informed and voluntary. In addition to these consumer protections, operators make judgments about the content and messages that customers want available, those that carry an unreasonable risk of harming customers, and those that (like competitors' campaigns) are aimed at undercutting their business. This is precisely the sort of editorial control the First Amendment protects; "a speaker has the autonomy to choose the content of his own message," including the right to "decide 'what not to say.'"[87] Through these requirements, operators seek to optimize the utility of text messaging services for their customers.

The fact that some third parties desiring to use short codes are denied them does not undercut wireless operators' constitutionally protected right to make discretionary content decisions. Such exclusion is inherent in the editing process. The decision to reject a CSC campaign is akin to a newspaper editor's decision not to feature a paid editorial or letter to the editor on the front page, but to make it available in a less visible part of the paper; the third party whose CSC is rejected may still make its content available to the wireless operator's customers, just without short codes. If, as Petitioners suggest, the First Amendment rights of speakers seeking to communicate over a media channel categorically trumped the speech interests of media owners and operators,[88] editorial control would be a constitutional nullity. Yet, the courts have recognized repeatedly, and in a wide range of contexts, that a media owner or operator's decisions about what to publish or transmit constitutes protected speech.[89]

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[87] *Hurley*, 512 U.S. at 573 (citation omitted).

[88] *See* Pet. at 20.

[89] *E.g.*, *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 378 (1984) (explaining that by providing "editorial initiative and judgment," television broadcasters are "engaged in a vital and independent form of communicative activity"); *Arkansas Educ. Television Comm'n v. Forbes*, 523 U.S. 666 (1997) (same); *Tornillo*, 418 U.S. at 258 (newspaper publisher); *City of Los Angeles,* 476 U.S. at 494 (cable operator); *Turner I*, 512 U.S. at 637 (same); *Satellite Broad. & Communications Ass'n*, 275 F.3d at 353 (satellite television operator); *cf. United States v. Am. Library Ass'n*, 539 U.S. at 194, 205-07 (public library control over internet access).

The relief sought by Petitioners would strip Verizon Wireless and other wireless operators of editorial control over CSC products. If operators were required to abide by non-discrimination rules in activating CSCs, they would be forced to accommodate any and all content providers seeking access for short code campaigns. This would eviscerate the measures developed by the industry and the wireless operators to protect wireless customers from unwanted, offensive, and fraudulent short code campaigns. The wireless operators could no longer insist upon compliance with the MMA's disclosure guidelines; they could no longer screen campaign applications for sexual content, drug use, and violence; and they could no longer reject campaigns offering products unsuitable for minors. By stripping wireless companies of such control, common carriage obligations would create a First Amendment burden that is no different, in principle, from other forced carriage rules subject to First Amendment scrutiny.[90]

B. Common Carriage Requirement Also Would Burden the Wireless Operators' Constitutionally-Protected Interest in Their Own Speech.

Like other wireless operators, Verizon Wireless engages in protected speech over its text messaging system and in its own short code campaigns. Verizon Wireless communicates directly with its customers using text messages, providing them with information about their accounts and offering them services. Verizon Wireless also modifies the text messages it receives from outside the network in order to conform them to its format and system. As noted, this process involves the addition of information to the message, including callback numbers and

[90] *Turner I*, 512 U.S. at 637 (explaining that federal must-carry requirements burdened the First Amendment rights of cable companies because they "reduce[d] the number of channels over which cable operators exercise unfettered control").

dates. Both Verizon Wireless' text messages to its customers and the information it adds to incoming messages are, at a minimum, commercial speech protected by the First Amendment.[91]

In addition to provisioning short codes for third party content providers, Verizon Wireless conducts its own short code campaigns. Through these campaigns, Verizon Wireless' customers can download ringtones, wallpaper images, and videos, among other content. In creating and transmitting this material, Verizon Wireless acts as a speaker entitled to full First Amendment protection.[92]

The imposition of nondiscrimination requirements on SMS could potentially burden both these forms of speech. Verizon Wireless' text messages to its customers, its customers' short code messages, and any responsive content could all be affected. This indirect interference with Verizon Wireless' right to speak on its network would exacerbate the direct abridgement of its right to editorial control.

C. Petitioners Have Not Justified the Burden that Common Carriage Requirements Would Place on the Wireless Operators' First Amendment Interests.

Because the common carriage obligations urged by Petitioners would incidentally burden speech, they must satisfy intermediate scrutiny.[93] To survive that test, a requirement of nondiscrimination in SMS and CSC provisioning would need to (1) "advance[] an important governmental interest unrelated to the suppression of free speech"; and (2) not "burden

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[91] *See Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) (extending commercial speech protection to "speech solely in the individual interest of the speaker and its specific business audience").

[92] Music files, electronically-transmitted visual images, and videogames all constitute fully-protected speech. *See ISKCON of Potomac, Inc. v. Kennedy*, 61 F.3d 949, 954 (D.C. Cir. 1995) (because audio tapes containing songs "may serve as medium of communication," the "sale of [the] audio tapes is protected by the First Amendment"); *Ashcroft v. ACLU*, 542 U.S. 656, 661, 667 (2004) (invalidating a statute barring posting of content "harmful to minors" on Internet); *Interactive Digital Software v. St. Louis County*, 329 F.3d 954, 957 (8th Cir. 2003) (videogames are protected by the First Amendment).

[93] *Turner I*, 512 U.S. at 662 (regulations incidentally burdening cable operator's editorial discretion are subject to intermediate scrutiny); *accord United States v. O'Brien*, 391 U.S. 367 (1968).

substantially more speech than necessary to further those interests."[94] On each of these issues, the Commission, and not the wireless operators, would bear the burden of proof.[95] Accordingly, the proposed nondiscrimination obligations would withstand judicial scrutiny only if a reviewing court determined, in its independent judgment, that the administrative record supported the agency's abridgment of editorial discretion.[96] Yet, Petitioners have offered no evidence to justify the sweeping regulatory intervention they propose; indeed, the Petition specifically acknowledges that the market for text messaging and short code services is thriving under the current regime.

Failure to Demonstrate a Concrete Harm: The Commission may not impose common carrier obligations unless they address a concrete harm. The government "must do more than simply 'posit the existence of the disease sought to be cured'" when it "defends a regulation on speech as a means to redress past harms or prevent anticipated harms."[97] To justify its regulations, the government "must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."[98] A showing grounded in "speculation and conjecture, " the Court has emphasized, is insufficient.[99]

Petitioners cannot even offer speculation here. The available evidence, Petitioners' own factual contentions, and the Commission's orders in related areas refute the existence of any market failure or anticompetitive conduct requiring government intervention. The undisputed

94 *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1996) ("*Turner II*").

95 *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 127, 183 (1999) ("the Government bears the burden of identifying a substantial interest and justifying the challenged restriction"); *Board of Trustees of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) (noting that "the State bears the burden of justifying its restrictions" and therefore "must affirmatively establish the reasonable fit we require").

96 *Sable Communications v. FCC*, 492 U.S. 115, 129 (1989).

97 *Turner I*, 512 U.S. at 664 (citation omitted).

98 *Edenfield v. Fane*, 507 U.S. 761, 771 (1992).

99 *Id.*

facts are that the market for text messaging and short code campaigns is growing rapidly,[100] that competition is robust,[101] and that consumers are benefiting.[102]

Petitioners themselves acknowledge the health of the current text messaging and short code markets. The Petition notes that "[t]ext messaging is rapidly becoming a major mode of speech in the United States"[103] and that "[c]ommercial and noncommercial interests alike are using text messaging as a new and powerful way to engage citizens in political action and public discourse on important issues."[104] According to the Petition, "[e]xamples abound" of content providers using SMS and CSCs in innovative ways to get their message out to wireless customers.[105] The increasing use of text messaging and short code campaigns in turn has stoked competition among firms developing technologies for these services.[106] As the Petition observes, the innovation in this sector is "exemplified by Mobile Commons' mConnect service," which enables consumers to use a short code to reply to text alerts and make an immediate telephone

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[100] *Twelfth CMRS Report,* ¶ 218 (noting that "the volume of SMS traffic continued to increase at a rapid pace in the past year," with "an increase of more than 90 percent" in the number of text messages sent in December 2006 over December 2005); Even Neufeld, "Common Short Codes: Cracking the Mobile Marketing Code," 2 (2007) (available at http://www.usshortcodes.com/docs/MMetrics White Paper.pdf) ("well over one billion dollars will be spent on mobile advertising globally in 2007, and by all counts the mobile advertising market is poised for exponential growth over the next several years"); Lowenstein, *supra* note 10, at 3-4.

[101] *E.g., Twelfth CMRS Report,* ¶¶ 202-03 (noting that although carriers currently enjoy healthy margins on SMS services, "the higher profitability of data services is but a temporary phenomenon since, 'as with everything in wireless, new features are often quickly replicated by the competition resulting in pricing pressure over time'"); *Growth of Mobile Messaging*, Computer Weekly, 2008 WLNR 3070277 (Jan. 8, 2008) (noting the intense competition between mobile text messaging carriers).

[102] *Twelfth CMRS Report,* ¶ 203 (noting that the average price of text messaging declined in 2006 after rising since 2002); Cathy Hong, *New Political Tool: Text Messaging*, Christian Sci. Monitor, 2005 WLNR 10257067 (June 30, 2005) (arguing that "cellphone text messaging, also known as SMS (short message service), may be the new political tool for activists"); Julia Mathesen, *Common Short Codes: The Next Venue for Trademark Disputes*, Mondaq Bus. Briefing, 2007 WLNR 8909861 (May 10, 2007) (noting that "short codes have been used for charitable solicitations, surveys, participation in sweepstakes, direct marketing, voting and polling efforts, Internet searches, and the receipt of a wide range of information including sports scores, restaurant reviews, and the like").

[103] Pet. at i.

[104] *Id.* at 20.

[105] *Id.*

[106] *See supra* notes 100-102.

call to their congressional representative.[107] All of these developments have occurred under the very industry standards and practices that Petitioners wrongly claim may stifle competition.

That the demand for text messaging and short codes has increased is hardly surprising, for it mirrors the dynamic growth and expansion in wireless services under the Commission's light-touch regulatory approach. The Commission has noted, for example, that wireless operators "have progressively introduced a wide variety of mobile data services and applications,"[108] and that they "compete on many more dimensions other than price, including non-price characteristics such as ... the provision of mobile data services."[109] It is precisely because the wireless market has consistently driven innovation and competition that the Commission continues to adhere to its long-standing approach of creating a "minimal regulatory environment."[110]

Failure to Show That Regulation Would Directly Advance Objectives: Beyond establishing the existence of an actual harm requiring redress, Petitioners must prove, and the Commission must find, that non-discrimination regulations would in fact alleviate that harm in a "direct and material way."[111] A reviewing court "may not simply assume that the ordinance will

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[107] Pet. at 14; *see* http://mcommons.com/mconnect.html.

[108] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with respect to Commercial Mobile Services, Eleventh Report*, 21 FCC Rcd 10947, 11001, ¶ 136 (2006). The Commission has repeatedly noted that there is "effective competition in the CMRS market." *Twelfth CMRS Report*, ¶ 1. As a result of this intense competition, "U.S. consumers continue to reap significant benefits—including low prices, new technologies, improved service quality, and choice among providers." *Id.*

[109] *Twelfth CMRS Report*, ¶ 124; *see also id.*, ¶ 171 ("In the past year providers have continued to exhibit competitive rivalry in introducing new mobile data offerings and responding to rivals' existing offerings.") (citing examples). The Commission has also noted that related wireless markets, such as the market for wireless broadband service offerings, are also experiencing brisk growth. *See Wireless Broadband Ruling,* 22 FCC Rcd at 5908, ¶ 17.

[110] *Wireless Broadband Ruling,* 22 FCC Rcd at 5903, ¶ 4 (explaining that, with respect to broadband platforms, the Commission has "determined to adopt a pro-competitive, deregulatory regime for these services"); *accord Wireline Broadband Order,* 20 FCC Rcd at 14855, ¶ 1 (adopting a framework that creates "a minimal regulatory environment for wireline broadband Internet access services to benefit American consumers and promote innovative and efficient communications"); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, 17 FCC Rcd 4798, 4802, ¶ 5 (2002) (same).

[111] *Turner I*, 512 U.S. at 664.

always advance the asserted [governmental] interests sufficiently to justify abridgement of expressive activity"; the court must assure itself that the restriction will actually produce the benefits anticipated by the government.[112]

Petitioners' contention that common carriage requirements will promote growth and competition in text messaging and short codes rests on the premise that consumers and content providers alike would, on balance, prefer an unmanaged environment to a platform managed by wireless operators. But the Petition offers scant evidence to ground this assumption. Petitioners have submitted no market study, survey data, or any other statistical analysis suggesting that demand exists for the content excluded under the wireless operators' current SMS and CSC standards, much less that this demand would offset the *reduction* in demand that would flow from the introduction of sexually explicit, violent, and potentially offensive content into these services. Conversely, nothing in the Petition shows that third-party advertisers would prefer to market their products in an SMS or CSC environment suffused with adult content.

The only "evidence" Petitioners offer consists of two anecdotal incidents out of thousands of short codes and hundreds of billions of text messages. That, to say the least, is an insufficient basis for the Commission to pursue the radical restructuring Petitioners propose. To justify restrictions on speech, the government "must present more than anecdote and supposition," and a "handful of complaints" will not do.[113] Even taken on their own terms, the two incidents relied upon by Petitioners are unpersuasive. As noted above, nondiscrimination regulations would have been redundant in the NARAL incident highlighted by Petitioners, since Verizon Wireless decided to accept the group's short code campaign. Competition would be

[112] *City of Los Angeles*, 476 U.S. at 496 (internal quotation marks and citation omitted).

[113] *United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 821-22 (2000); *see also id.* at 819 (noting, in the course of invalidating restrictions on indecent speech, that "[t]here is little hard evidence of how wide-spread or how serious the [asserted] ... problem ... is").

affirmatively *harmed* by the application of nondiscrimination regulations to force wireless operators to give competitors like Rebtel access to their networks, since the government, through intervention in this competitive market, would be dictating to some competitors that they must accommodate demands of other entities, rather than allow the market to guide arrangements that entities enter into.

In addition, courts have invalidated regulations under the "directly advances" prong of intermediate scrutiny when any connection between the regulation and the claimed problem would be merely "fortuitous."[114] In the absence of reliable evidence, it is equally plausible that the policies the wireless operators have put into place to combat spam and restrict the availability of adult content via short codes have *created* the conditions for growth in these markets. Consumers may be less willing to use text messaging services if they are bombarded by spam. And both consumers and third-party content providers may eschew short codes if they become associated with adult or offensive content. By opening up SMS and CSCs to all comers and preventing wireless operators from regulating the influx of content consumers do not want, nondiscrimination rules may well dampen consumer demand and hinder innovation.

Of course, the Commission need not speculate at all about the likely effects of non-discrimination rules here, for its experience with 900 services shows that Petitioners' predictions about the benefits of common carriage are flatly wrong. With carriers unable to bar 900 transmissions based upon their content, they quickly became dominated by dial-a-porn services. The resulting flight of other content providers and complaints by consumers forced Congress and the Commission to intervene.[115]

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[114] *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 507 (1995) (plurality).
[115] *See* Lowenstein, *supra* note 10, at 7-8.

Because Petitioners have advanced no evidence to show that nondiscrimination requirements stand to enhance innovation and competition, and because the available evidence is to the contrary, these requirements would fail constitutional review.[116]

Failure to Show Regulation Would Be Narrowly Tailored: Even if a market-wide problem actually existed in the text messaging and short code markets, and even if the proposed nondiscrimination obligations would redress it, those obligations would still fail First Amendment scrutiny because they are not narrowly tailored to Petitioners' stated goals.[117] This prong of intermediate scrutiny requires the government to prove that its restriction is "not more extensive than necessary" to serve its asserted interests.[118] A regulation fails on this score "if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech."[119]

Nondiscrimination requirements would burden the wireless operators' First Amendment rights needlessly, because a less restrictive and demonstrably effective alternative exists: industry oversight. Industry guidelines for text messaging and short code campaigns have produced a burgeoning market. By permitting the industry to continue regulating itself, the Commission would promote SMS and CSC expansion and innovation without impinging upon the wireless operators' constitutionally-protected right to exercise editorial control. Nor would such private control enable the wireless operators to silence advertisers and other third-party content providers with impunity, as Petitioners suggest. As illustrated by the NARAL incident, the market puts strong pressure on wireless operators to make available the content consumers

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[116] *See Turner I*, 512 U.S. at 664.

[117] *See id.* at 662.

[118] *Id.* (citation omitted).

[119] *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002); *accord Rubin v. Coors Brewing Co.*, 504 U.S. 476, 491 (1995) (holding that the availability of nonspeech "options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the challenged law] is more extensive than necessary").

want. And Verizon Wireless' response equally illustrates the industry's flexibility in adjusting to consumer needs and preferences.

VIII. CONCLUSION

For the reasons discussed above, the Commission should deny the Petition.

Respectfully submitted,

VERIZON WIRELESS

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Dated: March 14, 2008